

DRAFT - Correction of Assessments for Floatables/Odors and Subsequent Delisting

Supplement to the ‘DRAFT NYS 2018 Section 303(d) List of Impaired Waters Requiring a TMDL/Other Strategy’

There are 35 waterbody/pollutant combinations erroneously designated as impaired by “Floatables” or “Floatables/Odors” on the 2016 NYS Section 303(d) List of Impaired TMDL Waters and/or Integrated Report (IR) Category 4b (Impaired waters where a TMDL is not necessary because other required control measures). NYSDEC has examined these listings and their associated assessments along with current narrative water quality standards (WQS), found in Title 6 NYCRR Part 703.2. These narrative WQS are established per 40 CFR Part 131.6(c), which requires States to establish “Water quality criteria sufficient to *protect* the designated uses” (emphasis added). NYSDEC has concluded that these waters continue to meet their designated uses even in cases where floatables and/or odors may be present in excess of the WQS of ‘none’. The designated uses of these waters are not impaired nor threatened by floatables and/or odors and do not belong on the Section 303(d) List. The original listing for floatables and/or odors in these waters was an error based on incorrect application of the narrative standard, without consideration of how designated uses were impacted by floatable debris and odors typical of urban waters. In certain cases, the erroneous listing for floatables were added historically as a surrogate indicator for pollution related to the release of raw sewage to a waterbody. For such cases, a pathogen listing more appropriately captures the sewage related impairment and is a better metric for recovery once restoration measures are applied.

The current NYS narrative WQS for floating debris and odors applicable to the 35 waterbody/pollutant combinations discussed herein are summarized in the table below:

<i>Parameter</i>	<i>Classes</i>	<i>Standard</i>
Taste-, color-, and odor-producing, toxic and other deleterious substances	AA, A, B, C, D, SA, SB, SC, I, SD, A-Special, GA, GSA, GSB	None in amounts that will adversely affect the taste, color or odor thereof, or impair the waters for their best usages.
Oil and floating substances	AA, A, B, C, D, SA, SB, SC, I, SD, A-Special	No residue attributable to sewage, industrial wastes or other wastes, nor visible oil film nor globules of grease.
Garbage, cinders, ashes, oils, sludge and other refuse	SA, SB, SC, I, SD	None in any amounts.

In their 2004 Guidance for Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act; TMDL-01-03, USEPA advises that the following waters should be placed in IR Category 5: “...when it is determined, in accordance with the State’s assessment and listing methodology, that a pollutant has caused, is suspected of causing, or is projected to cause an impairment or threat.” Additionally, USEPA discusses in the guidance, that good cause for not including previously listed segments in IR Category 5 includes

“a demonstration that flaws in the original analysis of data and information led to the water being incorrectly listed and that the development of a new listing methodology, consistent with State WQSs and federal listing requirements, and a reassessment of the data that led to the prior listing, concluding that WQSs are now attained.” For the 35 waterbody/pollutant combinations designated as impaired due to floatables, NYSDEC failed to follow its own Consolidated Assessment and Listing Methodology¹ (CALM, March 2017) by not considering the impacts to designated uses when conducting the subject assessments and listings. The CALM warns against the direct application of WQS for assessment purposes as follows:

“Although the use of standards and criteria (particularly numeric standards/criteria) seems directly applicable to determining use support in ambient waters, an assessment methodology is necessary to address issues such as appropriate sampling methods, sampling location, sampling frequency or sample size, natural or background conditions, mixing zones, and so on.”

Impairment is far more complex than comparing a sample result or observation to the applicable WQS. Even when the monitoring data is ideal with regard to sampling methods, sampling location, sampling frequency or sample size, documenting natural or background conditions, and delineating the mixing zones, the overall designated uses of a waterbody must be considered when formulating the final assessment. Examining the original assessments that resulted in these determinations of impairment, there is evidence of incidental exceedances of the WQS of ‘none’, but there is nothing connecting these exceedances to impacts on any designated use of the water. This is counter to the requirements in CALM, which requires evaluations of use support and impacts be based on:

- the specific use(s), if any, that is/are affected;
- the severity of the impact on the use(s);
- the level of confidence corresponding to the evaluation of use support/impact.

In the case of these 35 waterbodies, we have no past or present floatables/odors data showing how a designated use is impacted and how severe that impact is. This lack of data linking floatables and odors to a use impact skews our confidence in these impairments toward “unconfirmed” or “suspected” as defined by the CALM. When linked to a use, an “Impaired-Suspected” use assessment results in an overall assessment of “Minor Impacts” and assignment to IR Category 2, while an “Impaired-Unconfirmed” use assessment results in an overall assessment of “Needs Verification” and assignment to IR Category 3. Neither of these scenarios, where confidence is reduced regarding the impacts of floatables/odors on designated use, would result in an overall assessment of “Impaired” and trigger the requirement to add the waterbody/pollutant combination to the Section 303(d) List. NYSDEC acknowledges that there are incidental exceedances of the WQS of ‘none’ in these waters and even in absence of a direct linkage to impacts on designated use, those exceedances will be recorded in the assessments for these waters.

¹ The NYSDEC CALM is drafted per USEPA’s “Consolidated Assessment and Listing Methodology - Toward a Compendium of Best Practices,” July 2002. The NYSDEC CALM is reviewed by EPA Region 2 each 303(d) listing cycle, and EPA’s feedback on the document is memorialized through the public comment process for NY’s 303(d) List.

The waterbody/pollutant combinations subject to this corrected assessment and delisting action, as allowed per CFR Part 130.7(b)(6)(iv), are as follows:

Two Mile Creek and tribs (0101-0005) [303(d) Part 1 – Floatables] (P)
Scajaquada Creek, Lower, and tribs (0101-0023) [303(d) Part 1 – Floatables] (P)
Scajaquada Creek, Middle, and tribs (0101-0033) [303(d) Part 1 – Floatables] (P)
Mohawk River, Main Stem (1201-0093) [303(d) Part 1 – Floatables] (P)
Utica Harbor (1201-0228) [303(d) Part 1 – Floatables] (P)
Mohawk River, Main Stem (1201-0010) [303(d) Part 1 – Floatables] (P)
Saw Mill River (1301-0007) [303(d) Part 1 – Floatables] (P)
Larchmont Harbor (1702-0116) [303(d) Part 1 – Floatables] (P)
Mamaroneck Harbor (1702-0125) [303(d) Part 1 – Floatables] (P)
Milton Harbor/Lower Blind Brook (1702-0063) [303(d) Part 1 – Floatables] (P)
Port Chester Harbor (1702-0260) [303(d) Part 1 – Floatables] (P)
Mohawk River, Main Stem (1201-0094) [303(d) Part 3b – Floatables] (P)
Arthur Kill, Class I, and minor tribs (1701-0010) [303(d) Part 1 – Floatables]
Arthur Kill, Class SD, and minor tribs (1701-0182) [303(d) Part 1 – Floatables]
Newark Bay (1701-0183) [303(d) Part 1 – Floatables]
Kill Van Kull (1701-0184) [303(d) Part 1 – Floatables]
Coney Island Creek (1701-0008) [IR 4b – Floatables] (P)
Gowanus Canal (1701-0011) [IR 4b – Floatables & Odors]
East River, Lower (1702-0002) [IR 4b – Floatables]
Newtown Creek and tidal tribs (1702-0002) [IR 4b – Floatables] (P)
East River, Upper (1702-0010) [IR 4b – Floatables]
East River, Upper (1702-00321) [IR 4b – Floatables]
Harlem River (1702-0004) [IR 4b – Floatables]
Bronx River, Lower (1702-0006) [IR 4b – Floatables] (P)
Bronx River, Middle, and tribs (1702-0106) [IR 4b – Floatables] (P)
Westchester Creek (1702-0012) [IR 4b – Floatables]
Flushing Creek/Bay (1702-0005) [IR 4b – Floatables] (P)
New Rochelle Harbor (1702-0259) [IR 4b – Floatables] (P)
Hutchinson River, Lower, and tribs (1702-0003) [IR 4b – Floatables & Odors]
Jamaica Bay, Eastern, and tribs Queens (1701-0005) [IR 4b – Floatables] (P)
Thurston Basin (1701-0152) [IR 4b – Floatables] (P)
Bergen Basin (1701-0009) [IR 4b – Floatables] (P)
Spring Creek (1701-0361) [IR 4b – Floatables] (P)
Hendrix Creek (1701-0006) [IR 4b – Floatables & Odors] (P)
Paerdegat basin (1701-0363) [IR 4b – Floatables & Odors]
Mill Basin and tidal tribs (1701-0178) [IR 4b – Floatables]

(P) = there is also a Pathogen listing for this waterbody